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 SEA PRESTIGIO, LLC
 11

12 UNITED STATES DISTRICT COURT
 13 SOUTHERN DISTRICT OF CALIFORNIA
 14

15 SEA PRESTIGIO, LLC, a Delaware
 limited liability company,

16 Plaintiff,

17 v.

18 M/Y TRITON, Republic of Marshall
 19 Islands (Official No. 70070), Its Engines,
 Machinery, Appurtenances, etc., *In rem*;
 20 SPEARFISH VENTURES, LTD., a
 British Virgin Islands Company; FBP
 21 INVESTMENTS, LP, a Delaware limited
 partnership; JAMES P. BALDWIN, as
 22 co-trustee of the James P. Baldwin Trust
 No. and Nancy L. Baldwin Trust No. 1;
 23 NANCY L. BALDWIN, as co-trustee of
 the James P. Baldwin Trust No. and
 24 Nancy L. Baldwin Trust No. 1; CACHAL
 INVESTMENTS, S. DE R.L. DE C.V., a
 25 Mexican corporation, *In Personam*, and
 DOES 1-10,

26 Defendants.
 27
 28

Case No.: 3:10-CV-02412-BTM (AJB)

IN ADMIRALTY

**PLAINTIFF'S OPPOSITION TO
 DEFENDANTS' *EX PARTE*
 APPLICATION TO STAY
 ACTION, OR IN THE
 ALTERNATIVE, REQUESTING
 LEAVE TO AMEND ANSWER TO
 FILE COUNTERCLAIMS,
 CONTINUE TRIAL DATE, AND
 EXTEND SCHEDULING ORDER
 DEADLINES**

[Declarations and Evidentiary
 Objections, filed concurrently herewith]

Date: March 18, 2011
 Time: 11:00 a.m.
 Location: Courtroom 15

Complaint Filed: November 23, 2010
 Trial Date: May 9, 2011

Glaser Weil Fink Jacobs
 Howard Avchen & Shapiro LLP

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants' *Ex Parte* Application ("Application") is improper and should be denied for procedural and substantive reasons. Procedurally, the Application is improper because there is no exigency. Defendants M/Y Triton, *et al.* (collectively, "Defendants") have known about the pendency of this case since its filing and have had adequate time to file a properly noticed motion for the relief requested. Moreover, the Application itself makes no argument of exigency justifying relief on an expedited basis, nor is there any.

Substantively, the Application should be rejected because this action (the "Federal Action") can resolve all the disputes at issue, while the similar action pending before the Orange County Superior Court (the "State Action") cannot resolve the arrest of defendant M/Y Triton (the "Yacht") and the foreclosure of the preferred ship mortgage on the Yacht (the "Preferred Ship Mortgage"), which is an *in rem* proceeding exclusively before this Court. Furthermore, trial in the Federal Action is scheduled for May 9, 2011, which will resolve this dispute months, if not years, before the State Action is resolved. The expedited trial date in the Federal Action will best preserve the declining value of the Yacht (the principal loan collateral), and will otherwise save Plaintiff substantial costs by minimizing the duration of the arrest for which Plaintiff is financially responsible. Defendants must establish exceptional circumstances in order to justify staying the Federal Action. They cannot do so.

The most efficient way to resolve the dispute between the parties is to allow Defendants to add counterclaims, which are in essence identical to their affirmative defenses. Then, this Court can resolve all claims, issues, and defenses between the parties, including the arrest and foreclosure of the Yacht. Plaintiff does not object to Defendants' request to amend their pleadings. Plaintiff does object, however, to Defendants' request to continue pre-trial deadlines and trial. Notwithstanding proper maintenance and repair of the Yacht by the custodian, every month that the Yacht

1 remains under arrest, its value not only declines, but Plaintiff must also continue to
 2 incur almost \$30,000 in monthly custodial and maintenance/repair fees. Thus, a trial
 3 delay would unduly prejudice Plaintiff by increasing Yacht arrest expenses while
 4 decreasing the value of Plaintiffs' principal loan collateral. (*See* Declaration of Don
 5 Beaumont ("Beaumont Decl."), ¶¶ 1-8) Furthermore, even if Defendants are allowed
 6 to amend their pleadings, the core factual and legal/equitable issues will remain the
 7 same, and no additional time will be necessary to prepare for trial.

8 **II. RELEVANT FACTUAL BACKGROUND**

9 On or about June 30, 2010, the parties entered into a loan agreement (the "Loan
 10 Agreement"), whereby Plaintiff agreed to loan \$21 million to Defendants, paid in two
 11 disbursements. [Docket No. 1 (Verified Complaint), Ex. B (Loan Agreement).] The
 12 master Loan Agreement and Promissory Note were secured primarily by a preferred
 13 ship mortgage (the "Preferred Ship Mortgage") on the Yacht, and a second mortgage
 14 on Defendants' property in Laguna Beach (the "Emerald Bay Mortgage"), as well as
 15 an agreement for the use of the Yacht by Dr. Henry Nicholas ("Nicholas"), Plaintiff's
 16 principal ("Yacht Use Agreement") (collectively, the "Loan Agreements").

17 Plaintiff made the first disbursement of \$15.5 million to Defendants on
 18 June 30, 2010. To date, Defendants have not returned any portion of these funds to
 19 Plaintiff (even though Defendants recently admitted at deposition that such monies
 20 should be repaid). The Loan Agreement conditioned a second disbursement in the
 21 amount of \$5.5 million, in part, on (1) Defendants not being in default under the Loan
 22 Agreement, the Preferred Ship Mortgage, or any of the other loan documents,
 23 including the timely payment of monthly interest; and (2) Defendants delivering into
 24 escrow a fully executed, mortgage "in recordable form" on property owned by
 25 defendant Cochal Investments in Cabo San Lucas (the "Cabo Mortgage"). [Docket
 26 No. 1, Ex. B (Loan Agreement), Art. I (defining "Conditions Precedent to Second
 27 Disbursement").]

28 Defendants failed to discharge several conditions precedent to the second

1 disbursement by, among other things, failing to pay interest and failing to deliver the
2 Cabo Mortgage into escrow. Defendants also failed to comply with several
3 provisions of the Preferred Ship Mortgage by, among other things, failing to pay the
4 Yacht crew, Yacht repair costs, and Yacht fuel, thereby creating liens on the Yacht in
5 breach of the Loan Agreements, including the Preferred Ship Mortgage. [Docket No.
6 28-4, p.8, lines 21-26 (Declaration of Emilio F. Gonzalez In Support of Sea
7 Prestigio's Opposition To Defendants' Motion To Vacate Warrant For Arrest Of
8 Vessel; Or, In The Alternative, For An Equitable Vacatur Of Warrant To Arrest
9 Vessel), ¶ 26, Ex. N.] Due to such failures, Plaintiff did not make the second
10 disbursement.

11 On October 7, 2010, based on the myriad breaches of the Loan Agreements,
12 Plaintiff accelerated the loan by delivering a notice of default to Defendants
13 demanding payment of all principal and interest, plus penalties and costs.
14 (Declaration of James T. Grant ("Grant Decl."), ¶ 4, Ex. 1 (notice of default).)
15 Plaintiff demanded a response by November 1, 2010.

16 On October 27, 2010, Defendants responded by filing an action in Orange
17 County Superior Court ("State Court") against Plaintiff, Nicholas, and his affiliates
18 for, among other things, breach of the Loan Agreement, and violation of California's
19 usury laws (the "State Action").

20 When it became clear that Defendants did not intend to comply with the
21 requirements of the Loan Agreements, Plaintiff enforced its rights by filing the
22 Federal Action on November 23, 2010, in which Plaintiff alleged breach of the Loan
23 Agreements and asserted, among other things, a claim for foreclosure of the Yacht
24 through the Preferred Ship Mortgage. On November 24, 2010, the Court issued an
25 order for the arrest of the Yacht to preserve Plaintiff's rights and remedies against
26 Defendants. [Docket No. 7.] On December 22, 2010, the Court denied Defendants'
27 motion to vacate the arrest. [Docket No. 33.] In denying Defendants' motion, the
28 Court preliminarily found that Plaintiff had shown that "an event of default [had]

1 occurred under the loan agreement...” and that Plaintiff had “met its burden of
2 showing entitlement to a maritime lien.” *Id.*

3 The Court has ordered an expedited trial to begin on May 9, 2011. [Docket No.
4 40.] The Court set the original trial date for April 4, 2011 at Defendants’ urging.¹
5 The discovery cutoff is March 11, 2011, and the parties are now completing extensive
6 discovery, including the exchange of over 4,000 documents (18,000+ pages) in
7 response to approximately 500 document requests, several sets of interrogatories and
8 requests for admissions, and several depositions. (Grant Decl. ¶ 5.) Plaintiff’s
9 motion for summary judgment will be filed March 28, 2011. [Docket No. 47.]²

10 In stark contrast, the State Action is not at issue. On January 31, 2011, the
11 State Action (which had been removed by Sea Prestigio, *et al.* on November 29,
12 2010) was remanded back to State Court. The pleadings are not settled to the extent
13 Sea Prestigio is required to seek leave to file cross-claims consistent with its claims in
14 the Federal Action, discovery has not begun, and the State Court has not held a status
15 conference, set any pre-trial deadlines, or a trial date. (Grant Decl. ¶ 6.)

16 **III. THE EX PARTE APPLICATION IS PROCEDURALLY IMPROPER.**

17 Seeking the requested relief on an expedited basis is unjustified because
18 Defendants had sufficient notice of their claims to file a properly noticed motion,
19 rather than the Application. *See* S.D. Cal. Civ. R. 7.1(e)(1). Here, Defendants knew
20 of all their counterclaims by or before October 27, 2010, when they filed their
21 complaint in the State Action. Defendants asserted all of the counterclaims in the
22 State Action complaint. Defendants could have, and should have, filed counterclaims
23

24 _____
25 ¹ In paragraph 42 of his declaration in support of Defendants’ unsuccessful motion to
26 vacate the arrest of the Yacht, James P. Baldwin requested that “this dispute be
expeditiously resolved[.]” [Docket No. 26-1, p. 11, line 1.]

27 ² On March 8, 2011, this Court granted the parties’ joint motion to, among other
28 things, continue the summary judgment motion filing deadlines to March 28, 2011,
after this Court rules on the Application. [Docket No. 47.]

1 with their answer on December 30, 2010. Furthermore, by January 31, 2011,
 2 Defendants knew that the Central District court had remanded the State Action back
 3 to State Court. Defendants could have filed a noticed motion in place of the
 4 Application as early as January 31, 2011. A noticed motion filed on that date would
 5 have been heard as early as March 1, 2011.

6 Defendants have not alleged any facts, or made any arguments, justifying their
 7 failure to file a noticed motion in place of an *ex parte* application. Because
 8 Defendants had adequate time to file a noticed motion, and no other grounds
 9 justifying an *ex parte* filing exist, the Application lacks good cause.

10 **IV. A STAY OF THIS FEDERAL ACTION IS UNWARRANTED BECAUSE**
 11 **THE EXCEPTIONAL CIRCUMSTANCES NECESSARY TO JUSTIFY**
 12 **A STAY DO NOT EXIST.**

13 **A. A Federal Court Is Obligated To Exercise Its Jurisdiction, Barring**
 14 **Exceptional Circumstances.**

15 Federal courts have a “virtually unflagging obligation ...to exercise the
 16 jurisdiction given them.” *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S.
 17 800, 813 (1976) (“*Colorado River*”). Abstention from the exercise of federal
 18 jurisdiction is considered “an extraordinary and narrow exception to the duty of a
 19 district court to adjudicate a controversy properly before it.” *Id.* at 817.³ The
 20 Supreme Court has repeatedly held that abstention due to considerations of judicial
 21 economy is appropriate only where exceptional circumstances favoring abstention
 22 exist. *See id.*; *see also Moses H. Cone Memorial Hospital v. Mercury Construction*
 23 *Corp.*, 460 U.S. 1, 19 (1983) (“*Cone*”) (district court abused its discretion in staying
 24 federal suit in deference to substantially similar state suit).

25
 26 ³ In their brief, Defendants state that, “[w]hen parallel proceedings pending in state
 27 court involve the same parties and the same issues, courts recognize a presumption
 28 that the entire suit should be heard in state court.” (Application, p. 5.) That
 presumption applies only in cases brought under the Declaratory Judgment Act. *See*
Gov’t Employees Ins. Co. v. Dizol, 133 F.3d1220, 1223-1225 (9th Cir. 1998).

1 A district court has limited discretion to abstain from adjudicating a case where
2 a substantially similar case is pending before a state court. The district court must
3 exercise such discretion within the “exceptional circumstances” limits of the
4 *Colorado River* abstention doctrine. *See Underwriters, Inc. v. The Continental Ins.*
5 *Co.*, 842 F.2d 1253, 1256 (9th Cir. 1988) (“*Underwriters*”) (district court’s discretion
6 in abstention cases is narrower than its discretion in other matters, such as rulings on
7 evidentiary issues); *see also Cone*, 460 U.S. at 19.

8 The Supreme Court has set forth several factors to determine whether a stay of
9 a federal action in deference to a similar state action is warranted: (1) which court
10 first assumed jurisdiction over property involved in the litigation; (2) the relative
11 convenience of the forums; (3) the desirability of avoiding piecemeal litigation;
12 (4) the order in which jurisdiction was obtained by the concurrent forums; (5) whether
13 federal law provides the rule of decision on the merits; (6) whether the state court
14 proceedings are inadequate to protect the federal litigant’s rights; and (7) the
15 prevention of forum shopping. *Colorado River*, 424 U.S. at 818-819; *see also Cone*,
16 460 U.S. at 14; and *Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1367-68 (9th
17 Cir. 1990).

18 In setting forth the above factors, the Supreme Court in *Colorado River* and its
19 progeny noted that “a carefully considered judgment taking into account both the
20 obligation to exercise jurisdiction and the combination of factors counseling against
21 that exercise is required.” *Colorado River*, 424 U.S. at 818. The Court emphasized
22 that “only the clearest of justifications will warrant dismissal.” *Id.*

23 **B. The Colorado River Factors Weigh Heavily Against Staying The**
24 **Federal Action.**

25 **1. The Federal Court Was The First To Assert Jurisdiction Over**
26 **Property Involved In The Dispute.**

27 This Court was the first to assert jurisdiction over the res in this dispute — *i.e.*,
28 the Yacht — which is the principal collateral securing Plaintiff’s rights and remedies

1 against Defendants under the Loan Agreements. The Court asserted jurisdiction over
2 the Yacht when it authorized a warrant arresting the Yacht on November 24, 2010.
3 The Yacht is currently under arrest and under the jurisdiction of this Court.
4 Therefore, the jurisdiction factor under *Colorado River* weighs in favor of denying a
5 stay of the Federal Action.

6 **2. The Federal Action Is Not Only The More Convenient Forum,**
7 **But It Is Also The Exclusive Forum For Resolving The Entire**
8 **Action.**

9 This Court is the only forum in which all of the claims, issues, and defenses
10 involved in both the State Action and Federal Action can be heard, because only the
11 Federal Court can assert jurisdiction over the Yacht and adjudicate the foreclosure of
12 the Yacht. It is well-established that “the first court to gain jurisdiction over a res
13 exercises exclusive jurisdiction over an action involving that res.” *United States v.*
14 *Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1013 (9th Cir. 1999). The Court has *in*
15 *rem* jurisdiction over the Yacht, and thus holds exclusive jurisdiction over matters
16 concerning the Yacht. Section 31325(c) of United State Code Title 46) grants the
17 federal courts exclusive jurisdiction over *in rem* actions against foreign vessels, such
18 as the Yacht, which is registered under the laws of the Republic of the Marshall
19 Islands. *See* 46 U.S.C. § 31325(c). Therefore, the State Court has no power to
20 preside over an action for the foreclosure of the Yacht.

21 Defendants admit that the only difference between the two actions is that the
22 Federal Action involves a claim for foreclosure on the Yacht pursuant to the Preferred
23 Ship Mortgage. (Application, pp. 6-7.) Because this Court is the only possible forum
24 for adjudicating the foreclosure of the Yacht, it is the only possible forum for
25 resolving all of the claims, issues, and defenses arising out of this secured loan
26 transaction. Thus, the Federal Action is the only way of resolving this dispute in a
27 single action, while staying the Federal Action would require the piecemeal
28 adjudication of all claims, issues, and defenses through two separate actions.

1 Therefore, under *Colorado River*, the relative convenience of forums weighs in favor
2 of denying a stay of the Federal Action.

3 **3. Denying The Stay Request Will Avoid Piecemeal Litigation.**

4 The prosecution of the Federal Action assures avoidance of piecemeal litigation
5 because this Court can resolve all of the claims, issues, and defenses in both the
6 Federal Action and the State Action. In contrast, the State Court cannot hear all of the
7 claims, issues, and defenses between the parties because the State Court cannot
8 resolve claims, issues, and defenses concerning the Yacht. For example, if the parties
9 were to litigate their claims in State Court first, and the State Court were to find in
10 favor of Plaintiff, then Plaintiff would be forced to return to this Court to foreclose
11 on the Yacht. This Court would then need to consider evidence relating to the Loan
12 Agreements, thereby duplicating the efforts of the State Court. On the other hand, if
13 Defendants amend their pleadings in the Federal Action to include counterclaims, as
14 stipulated by Plaintiff, then the Federal Action would include all claims, issues, and
15 defenses in this dispute, and Defendants could avoid piecemeal litigation by
16 dismissing the State Action.⁴

17 Moreover, if this Court hears the Federal Action, then it will likely resolve all
18 claims, issues, and defenses between the parties before the State Court expends any
19 resources in the State Action. In the Federal Action, the parties are filing summary
20 judgment motions by March 28, 2011, with a hearing on April 25, 2011. This case
21 could, therefore, be resolved in approximately six weeks. The trial in the Federal
22 Action is set for May 9, 2011, whereas no trial date has been set for the State Action.
23 Moreover, the parties are now completing extensive discovery in the Federal Action,
24 while discovery has not begun in the State Action. (Grant Decl., ¶¶ 5-6.) Therefore,
25 the Federal Action will conclude before progress is made in the State Action. Thus,
26

27 ⁴ In the interest of avoiding piecemeal litigation, Plaintiff will waive prevailing party
28 costs in the State Action if Defendants dismiss the State Action upon amending their
pleadings in the Federal Action. (Grant Decl., ¶ 3.)

1 adjudication of the Federal Action will prevent duplicative litigation efforts by
2 disposing of all claims, issues, and defenses between the parties well before the State
3 Court wastes judicial resources.

4 **4. The Federal Action Has Priority Over The State Action**
5 **Because The Federal Action Is Much Further Along Than The**
6 **State Action.**

7 To determine which case has priority, this Court should focus on the progress
8 actually made in each case, rather than which complaint was filed first. *See*
9 *Underwriters*, 843 F.2d at 1257. The parties are filing summary judgment motions on
10 March 28, and the hearing is on April 25. The trial in the Federal Action is set to
11 begin on May 9, 2011. Based on the March 11 discovery cutoff in the Federal
12 Action, the parties are now concluding substantial discovery. (Grant Decl., ¶ 5.) In
13 contrast, in the State Action, there has been no progress beyond the filing of initial
14 pleadings. Discovery has not begun, and no pretrial or trial dates have been set in the
15 State Action. (Grant Decl., ¶ 6.) Moreover, if the Federal Action were stayed,
16 Plaintiff would have to amend its pleadings in the State Action and file cross-claims
17 consistent with the Verified Complaint in the Federal Action.

18 **5. The Existence Of State Law Claims Is Insufficient To Warrant**
19 **A Stay Of The Federal Action.**

20 The presence of the federal law issues in this case, per this Court's *in rem*
21 jurisdiction over the Yacht, as well as Plaintiff's foreclosure claim as to the Yacht
22 under the federal Commercial Instruments and Maritime Liens Act ("Maritime Liens
23 Act"), 46 U.S.C. §§ 31301-31343, weighs heavily against staying the Federal Action.
24 The presence of federal law issues must always be a major consideration weighing
25 against a stay. *See Cone*, 460 U.S. at 26. On the other hand, the presence of state law
26 issues rarely suffices on its own to warrant a stay. *See id.*; *see also Travelers Indem.*
27 *Co. v. Madonna*, 914 F.2d 1364, 1370 (9th Cir. Cal. 1990) (existence of state law
28 claims does not weigh in favor of abstention because case involved routine issues of

1 state law such as misrepresentation, breach of fiduciary duty, and breach of contract,
2 which district court is fully capable of deciding).

3 The Preferred Ship Mortgage on the Yacht is governed by the Maritime Liens
4 Act. The Maritime Liens Act requires uniform application of federal maritime law.
5 *See Fouchon, Inc. v. La. Nat'l Leasing Corp., et al.*, 723 F.2d 376, 383 (5th Cir.
6 1984) (where preferred ship mortgage is concerned, court must apply maritime law to
7 avoid “undesirable lack of uniformity”). Accordingly, the need for uniform
8 application of federal maritime law in this case weighs in favor of denying
9 Defendants’ request for a stay the Federal Action.

10 Furthermore, the state claims, issues, and defenses in the Federal Action not
11 only raise issues of California law, but they also implicate federal law under the
12 Maritime Liens Act). While Defendants raise the issue of usury under California law,
13 California law on such issue is preempted by the Maritime Liens Act. *See* 46 U.S.C.
14 § 31322(b) (“Any indebtedness secured by a preferred mortgage that is filed or
15 recorded under this chapter ..., may have any rate of interest to which the parties
16 agree.”); *see also Nat G. Harrison Overseas Corp. v. American Barge Sun Coaster*,
17 475 F.2d 504, 506 (5th Cir. 1973) (46 U.S.C. § 926(d), predecessor statute to 46
18 U.S.C. § 31322(b), preempted Georgia usury law); and *Fouchon, Inc.*, 723 F.2d at
19 383 (predecessor statute to 46 U.S.C. § 31322(b) preempted Louisiana usury law).
20 Additionally, this Court has the power to apply the state laws involved in resolving
21 the remaining state claims, issues, and defenses.⁵ Accordingly, the existence of
22 claims, issues, and defenses that are purportedly governed by California law does not
23 justify a stay of the Federal Action.

24
25 _____
26 ⁵ Defendants cite to *United Gas Pipe Line v. Ideal Cement Co.* for the proposition that
27 “a federal question be deferred until the potentially controlling state law is
28 authoritatively put to rest.” 369 U.S. 134, 135-136 (1962). In *United Gas*, the district
court interpreted a city license code that had not been interpreted by any state court.
Id. In contrast, this Court will apply well-settled state law regarding breach of
contract.

1 **6. The State Court Cannot Adequately Protect Plaintiff's Rights.**

2 This factor concerns whether the state court can adequately protect Plaintiff's
3 federal rights. *See Travelers Indem. Co.*, 914 F.2d at 1370. Plaintiff's right to
4 foreclose on the Yacht arises under the federal Maritime Liens Act. For the reasons
5 discussed above, the State Court lacks jurisdiction over the Yacht and, therefore,
6 cannot enforce Plaintiff's right to foreclose on the Yacht under the Preferred Ship
7 Mortgage. Accordingly, the State Court cannot adequately protect Plaintiff's federal
8 rights.

9 Moreover, Defendants argue that a stay of the Federal Action would protect
10 both parties' rights by maintaining the status quo, *i.e.*, the Yacht will remain under
11 arrest pending outcome of the State Action. (Application, p. 10.) However,
12 prolonging the status quo would unduly prejudice Plaintiff. Presently, Defendants
13 hold Plaintiff's \$15.5 million in principal (plus unpaid interest, penalties, and costs)
14 from the First Disbursement. Plaintiff also is not receiving the benefit of its collateral
15 because the Yacht is under arrest. Plaintiff must continue paying approximately
16 \$30,000 in monthly custodial fees during the arrest. (Beaumont Decl., ¶ 7.)
17 Additionally, the value of the Yacht, Plaintiff's principal loan collateral, continues to
18 decline pending final adjudication. (Beaumont Decl., ¶¶ 6, 8.) Accordingly, any
19 further delay in final adjudication would unduly prejudice Plaintiff by denying it the
20 benefit of its loan funds, requiring it to pay substantial out-of-pocket costs to preserve
21 its collateral, and otherwise impairing the value of its collateral.

22 As established above, the State Action constitutes unduly protracted litigation
23 relative to the Federal Action. However, the expedited adjudication of all claims,
24 issues, and defenses in the Federal Action on the scheduled trial date of May 9, 2011
25 (or possibly before then through summary judgment) will minimize Plaintiff's
26 damages and costs. Accordingly, this Court is the only forum that can adequately
27 protect Plaintiff's rights.
28

7. Plaintiff Cannot “Forum Shop” Because The Federal Action Is The Only Proper Forum For Adjudicating All Of Plaintiff’s Claims.

Plaintiff has no choice but to adjudicate its action for foreclosure on the Yacht in federal court. Plaintiff had to file the Federal Action in this Court because the Yacht is located in the Court’s jurisdiction.⁶ Furthermore, this Court is the only forum in which Plaintiff can foreclose on the Yacht because this is the only court with jurisdiction over the Yacht.

In contrast, Defendants have the *choice* of bringing all of their claims before this Court and resolving the dispute in an expeditious and thorough manner. Yet Defendants insist on a state forum for no stated reason. Defendants preemptively filed the State Action after receiving a demand letter from Plaintiff’s counsel on October 7, 2010. (Grant Decl., ¶ 4, Ex. 1.) Even though this Court can resolve all of the claims, issues, and defenses stated in the State Action more efficiently and conclusively than the State Court, Defendants continue to engage in forum shopping by insisting on the piecemeal adjudication of those claims by the State Court, rather than this Court. This Court should ignore such gamesmanship and delay tactics.

Accordingly, based on all the above factors, Defendants here failed to make a showing of the requisite “exceptional circumstances” to stay the Federal Action. Indeed, the circumstances in this case strongly favor adjudication of all claims, issues, and defenses between the parties in the Federal Action, either by summary judgment or trial in the next sixty days.

⁶ Subject matter jurisdiction lies in the district court where the vessel or other res is located, and that jurisdiction attaches when the vessel is arrested within the jurisdiction. *See* Fed. R. Civ. P. Supp. R. C(2); *see also In re Millenium Seacarriers, Inc.*, 419 F.3d 83, 94 (2d Cir. 2005); *American Bank of Wage Claims v. Registry of the Dist. Court of Guam*, 431 F.2d 1215, 1218 (9th Cir. 1970); and *The Resolute Wilson v. The Resolute*, 168 U.S. 437, 439 (1897) .

V. **PLAINTIFF DOES NOT OBJECT TO DEFENDANTS' REQUEST TO AMEND DEFENDANTS' RESPONSIVE PLEADINGS; HOWEVER, DEFENDANTS HAVE NOT SHOWN GOOD CAUSE FOR CONTINUING THE PRE-TRIAL AND TRIAL DATES.**

Local Rule 16.1 states that "the trial date must be firm and all requests for continuances of trial and motions dates will be granted only for good cause shown." S.D. Cal. Civ. R. 16.1. Defendants allege no facts and make no arguments as to why a continuance of the trial date is necessary. Defendants knew of all their counterclaims on or before October 27, 2010, when they filed the State Action, and they had the opportunity to file counterclaims with their answer to the Complaint in the Federal Action on December 30, 2010. Thus, Defendants cannot show good cause for continuing the trial date.

Additionally, the requested trial continuance would come at great expense and prejudice to Plaintiff. As explained above, Defendants have over \$15.5 million of Plaintiff's money, Plaintiff continues to be responsible for funding the arrest of the Yacht, and the value of the Yacht continues to decline pending final adjudication of this dispute. (Beaumont Decl. ¶¶ 6, 8.) Accordingly, the Court should deny Defendants' unfounded request for a trial continuance.

1 **VI. CONCLUSION**

2 For the foregoing reasons, Plaintiff respectfully requests that the Court (1) deny
3 Defendants' request to stay the Federal Action; (2) grant Defendants' stipulated
4 request to amend their pleadings; and (3) deny Defendants' request to continue the
5 trial date and other pre-trial deadlines.

6
7 DATED: March 10, 2011

Respectfully Submitted,

8 GLASER WEIL FINK JACOBS
9 HOWARD AVCHEN & SHAPIRO LLP

10 By: /s/ James T. Grant
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel who have consented to electronic service are being served with a copy of the foregoing document via the Southern District of California CM/ECF system on March 10, 2011.

/s/ James T. Grant

James T. Grant

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